82-14

Office - Supreme Court, U.S.
FILED
JUN 21 1982
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

No. _____

MOXIE A. SHIRLEY and
WILMA C. SHIRLEY, Petitioners

v

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE

COURT OF APPEALS FOR THE SECOND CIRCUIT

Moxie A. Shirley and
Wilma C. Shirley
Petitioners Pro Se
Post Office Box 209
Rackerby, California
95972

QUESTIONS PRESENTED

I

Is the Small Business Administration exempt from the laws of Congress?

As the holder of a mortgage lien against a bankrupt's estate, is the Small Business Administration required to prove its claim and assert its lien in the Court of Bankruptcy?

Does Section 57 (n) of the Bankruptcy Act, Title 11 U. S. C. 93 (n), apply to the United States as a creditor with a provable claim?

Is the Small Business Administration, as the purchaser of a note and mortgage from a bank, required to abide by the terms of the note as agreed upon between the original lender and borrower?

II

Does Title 11 U.S.C. 32 (f) protect a bankrupt from action in any court other than the Bankruptcy Court to enforce a

claim?

Is a judgment obtained in another court null and void?

III

Can a trustee in bankruptcy act on a lien of mortgage which has been withheld from his jurisdiction?

Can a trustee in bankruptcy sell an interest in or title to an asset which was never brought into court for administration? Is a title manufactured from thin air valid?

In absence of any authority of the trustee to administer real property, does fee simple title remain in the bankrupt as owner?

INDEX

	Page
Opinions Below.....	2
Jurisdiction.....	2
Question Presented.....	2
Statute Involved.....	3
Statement of Case.....	4
Reasons for Granting Writ.....	12
Conclusion.....	15

Appendix A

Opinion and Affirmation of Judgment of United States Court of Appeals for the Second Circuit, of April 19, 1982..... A-I

Opinion of United States District Court for the Northern District of New York, granting Respondent's Motion for Summary Judgment of August 5, 1981..... A-II

TABLE OF CASES

Page

Gould v McBride, 319 NYS 2d 125, 36 A.D. 2d 706, aff'd 36 NYS 2d 565 (1971), 29 NY 2d 768..... 10

Film Associates, Inc. v Rogers 38 A.D. 2d 6, 326 NYS 2d 565 (1977)..... 11

Prebyl v Prudential Ins. Co. of America, 98 F 2d 199, 200 (8th Circuit)..... 11

DeLaney v City and County of Denver, 185 F 2d 246, 251 (10th Cir. 1950)..... 11

Pepper v Litton, 1939, 308 U.S. 295, 41 Am. B.R. (N.S.) 279, 60 S. Ct. 238, 84 L. Ed. 281..... 13

STATUTES

Bankruptcy Act of 1936, Section 57 (n) (Title 11 USC 93 n)..... 3

Title 11 USC 32 (f)..... 4

MISCELLANEOUS

Collier on Bankruptcy, 14th Ed., Vol 3, para. 57.27, p. 427..... 11

3 Collier on Bankruptcy, 14th Ed., 116, footnote 35..... 14

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

NO._____

MOXIE A. SHIRLEY and
WILMA C. SHIRLEY, PETITIONERS

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Moxie A. Shirley and Wilma C. Shirley, Petitioners herein, pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit, entered in the above-entitled matter on April 19, 1982.

OPINIONS BELOW

The opinion and affirmation of judgment of the Court of Appeals for the Second Circuit is unreported and is reproduced in Appendix A-I hereto.

The opinion of the United States District Court is reproduced in Appendix A-II hereto.

JURISDICTION

The judgment of the Court of Appeals (Appendix A-I) was entered on April 19, 1982. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the Small Business Administration, as the holder of a mortgage lien against a bankrupt's estate, is required to prove its claim and assert its lien in the Court of Bankruptcy.

a. Does Section 57 (n) of the

Bankruptcy Act, Title 11 U. S. C. 93/(n), apply to the United States as a creditor with a provable claim?

b. Is the Small Business Administration, as the purchaser of a note and mortgage from a bank, required to abide by the terms of the note as agreed upon between the original lender and borrower?

2. Whether Title 11 U. S. C. 32 (f) protects a bankrupt from action in any court other than the Bankruptcy Court to enforce a claim.

a. Is a judgment obtained in another court null and void?

3. Whether a trustee in bankruptcy can act on a lien of mortgage which has been withheld from his jurisdiction.

STATUTORY PROVISIONS INVOLVED

This case involves the Bankruptcy Act of 1936, Section 57 (n), Title 11 U. S. C. 93 (n), which provides as follows:

> (A)ll claims provable under this title, including all claims of the United States and of any State or any subdivision thereof, shall be proved and filed in the manner provided in this section. Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed: Provided, however, That the court may, upon application before the expiration of such period and for cause shown grant a reasonable fixed extension of time for the filing of claims by the United States or any State or any subdivision thereof...

and Title 11 U. S. C. 32 (f):

> An order of discharge shall--(1) declare that any judgment theretofore or thereafter obtained in any other court is null and void...and (2) enjoin all creditors whose debts are discharged from thereafter instituting or continuing any action or employing any process to collect such debts as personal liabilities of the bankrupt.

STATEMENT OF THE CASE

This is a mortgage foreclosure action brought against Petitioners by the United States of America, on behalf of the Small Business Administration (hereinafter called the SBA), in the United States District

Court for the Northern District of New York. This action was commenced on October 10, 1978, four years after the filing of a petition in bankruptcy by Petitioners herein, and seven months after the closing of the estate in the court of bankruptcy. The SBA did not file its provable claim within the bar time required by Section 57 (n) of the Bankruptcy Act, and took no action whatsoever to assert its mortgage lien during the four years in which the estate was under the jurisdiction of the bankruptcy court. Nor did the trustee bring the mortgaged property into court and act upon it in the same manner and upon like terms as the claims of other creditors.

On May 2, 1968, Petitioners herein signed a promissory note to the Bank of Lake Placid, Lake Placid, New York, in return for a loan of $20,000. The note was secured by a mortgage covering real property

located in the County of Clinton, State of New York. The mortgage merely created a lien against the property, which, upon the filing of a petition in bankruptcy, became a provable claim. The terms of the Note expressly provided that:

> The Indebtedness shall immediately become due and payable, without notice or demand, upon...the filing of a petition by or against the undersigned...under the provisions of the Bankruptcy Act of 1898, as amended.

On September 15, 1969, prior to the due date, the Bank of Lake Placid sold the note and mortgage to the SBA. Petitioners continued to make payments to the SBA until September 1973. Shortly thereafter, with full knowledge of the SBA, preparations were being made by Petitioners and their attorney for the filing of a petition in bankruptcy, which precluded further payments to any creditors. Petition in bankruptcy was filed on February 4, 1974. The SBA was duly listed as a secured creditor with a

provable claim. The SBA did not participate in the bankruptcy proceedings in any way. They neither proved their claim nor released the mortgaged property for sale under the jurisdiction of the bankruptcy court. Petitioners' debts were discharged on July 16, 1975. The estate was closed in bankruptcy court on March 6, 1978, by order of Bankruptcy Judge Justin J. Mahoney.

Alleging default, the United States instituted action against Petitioners on October 10, 1978, demanding judgment to collect debt claimed due and owing in the amount of $28,143.89, together with interest at the rate of 6% per annum. Interest has continued to accrue until May 3, 1982, when the amount claimed due and owing was $36,214.78.

Petitioners were served with Summons and Complaint on April 6, 1979, and filed Answer on or about April 27, 1979, denying certain of the allegations and asserting

the affirmative defense of the time period within which the right of action must have accrued and failure to state a cause of action.

Respondent, United States of America, moved for summary judgment on December 10, 1979.

Petitioners filed Opposition to summary judgment on or about January 4, 1980, citing Section 57 (n) of the Bankruptcy Act as a bar to the action against them.

On August 5, 1981, the District Court for the Northern District of New York granted summary judgment in favor of United States of America.

Petitioner filed Notice of Appeal to the Second Circuit Court of Appeals on October 5, 1981. Brief was filed on November 16, 1981.

Scheduling order was mailed January 6, 1982, ordering appellee's brief to be filed by February 5, 1982.

Respondent (appellee) filed Motion for Summary Affirmance on or about January 4, 1982, arguing that the District Court correctly held that the time limitation for filing proofs of claim, Section 57 (n), does not apply to the United States as a secured creditor.

Petitioners filed Opposition to Motion for Summary Affirmance on or about January 16, 1982, arguing that the grant of jurisdiction over this action was expressly given by Congress to the bankruptcy court.

On February 10, 1982, the Court of Appeals ruled in favor of Petitioners and denied Respondent's Motion for Summary Affirmance.

On February 23, 1982, the Court of Appeals found the United States in default for failure to file its brief within the time ordered.

On February 26, 1982, the United States filed Motion for Leave to File

Motion Out of Time and For Permission to File Appellee's Brief. Motion was granted.

Petitioners filed Reply Brief and oral argument was heard on April 16, 1982, with Petitioners arguing and Respondent submitting.

On April 19, 1982, the Court of Appeals ruled in favor of the United States and affirmed the summary judgment of the District Court, holding that the United States was exempt from Section 57 (n) and, therefore, there was no material dispute.

THE RULINGS BELOW.

The District Court ruled, Gould v. McBride, 319 NYS 2d 125, 36 A.D. 2d 706, aff'd 36 NYS 2d 565 (1971), 29 NY 2d 768, that Petitioners' assertions in opposition to Respondent's motion for summary judgment did not effect SBA's lien on the mortgaged property, that there was no material dispute and thereby granted summary judgment in favor of Respondent.

The District Court also ruled that Section 57 (n) of the Bankruptcy Act did not apply to the United States, as holder of a lien of mortgage, Film (Felin) Associates, Inc. v. Rogers, 38 A.D. 2d 6, 326 NYS 2d 413; that Section 57 only affects the status of unsecured claims, Collier on Bankruptcy, 14th Ed., Vol 3, para. 57.27, p. 427; and that Petitioners' discharge in bankruptcy does not preclude foreclosure upon the lien now, even though the SBA remained silent during the bankruptcy proceedings, Prebyl v. Prudential In. Co. of America, 98 F 2d 199, 200 (8th Cir.) (construing Nebraska law).

The Court of Appeals affirmed the judgment of the District Court, holding that Section 57 deals with unsecured claims and does not apply to a holder of a valid secured lien, DeLaney v. City and County of Denver, 185 F 2d 246, 251 (10th Cir. 1950).

If Section 57 does not govern claims of the United States and does not govern

secured claims, where does it apply? What is the precise objective of the statute?

REASONS FOR GRANTING THE WRIT

The issue in this case is not whether or not Petitioners signed a promissory note in 1968, secured by a mortgage lien against certain real property, but whether or not the SBA, as holder of the note and mortgage, was required to assert its claim under the jurisdiction of the bankruptcy court, in accordance with the requirements of Title 11 U.S.C. 93 (Section 57 of the Bankruptcy Act), the General Orders of the Supreme Court; and whether or not failure to act within the proper jurisdiction renders the judgment of the District Court null and void, as guaranteed under Title 11 U. S. C. 32 (f), and ordered by Bankruptcy Judge Justin J. Mahoney in the Discharge of Bankrupt, July 16, 1975.

The cases in which the lower courts have determined Section 57 to be inapplicable to the instant case have been incorrectly

construed. They do not present the same legal problem; therefore, the application of stare decisis is not legally sound.

Petitioners argued the intent of the law by citing Pepper v. Litton, 1939, 308 U.S. 295, 41 Am. B. R. (N.S.) 279, 60 S.Ct. 238, 84 L. Ed. 281, in which, by way of dictum, in a footnote (308 U.S. p. 305, 41 Am. B.R. (N.S.) at p. 280, S. Ct. p. 244, 84 L. Ed. 281, the Supreme Court said:

> ...Congress has by express legislation given special recognition to the problem of claims by governmental bodies and has delimited by precise language the extent to which they may be favored...
>
> Specifically, the present statute makes the time limitation expressly applicable to the claims of the United States...
>
> It confers a favorable exception upon governmental claims by permitting the court to grant an application, made within the specified time limit, for a 'reasonable fixed extention'...

The Supreme Court went on to refer to the report of the Senate Committee which had the bill under consideration and quoted

3 Collier on Bankruptcy, 14th Ed., 116, footnote 35, as follows:

> In the Senate Report No. 1916 on H.R. 8046, 75th Cong., 3rd Sess. (1938) 5, it was said: "The House bill includes within the bar time for the proving of claims, all claims of the United States and of any State or subdivision thereof. The committee has both strengthened and extended this proposed amendment by providing, first, that such claims must actually be filed within the bar time, and, second, by permitting additional time for the filing of such claims upon application for cause shown. The committee agrees with the proposal that governmental claims should be subjected to the same requirements as other claims but is of the opinion that the limitation should be tempered by the provision for extension."

Petitioners' argument was ignored. The Courts below simply convicted Congress of a self-contradiction which the wording of the law does not warrant; transcended dictum of the Supreme Court with assertions contrary thereto; and exempted the United States and all secured claimants from a jurisdiction conferred by an Act of Congress.

It is inconveivable that the rulings of the Courts below could stand. The issue should be resolved by this Court in order to establish a binding precedent upon which future cases must lie.

Additional cause for certiorari lies in the conflict within the Court of Appeals on whether or not summary judgment should be affirmed.

The issue involves the jurisdiction of a court established by an Act of Congress and laws enacted pursuant thereto.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

June 15, 1982
Date

Moxie A. Shirley

Wilma C. Shirley

Moxie A. Shirley
Wilma C. Shirley
Petitioners Pro Se
Post Office Box 209
Rackerby, California
95972